

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Amendment of the Commission's)
Rules to Establish Part 27,)
the Wireless Communications Service ("WCS"))

GN Docket No. 96-228

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REPLIES OF NEXTWAVE TELECOM INC.

NextWave Telecom Inc. ("NextWave") hereby submits its reply comments to the Federal Communications Commission ("FCC" or "Commission") Notice of Proposed Rulemaking in the above-captioned proceeding.¹ NextWave is an entrepreneurial personal communications service (PCS) company that has participated in each PCS Entrepreneur's Block auction and was the winning bidder of 63 C block markets in the auctions completed in May and July 1996.

THE COMMISSION MUST CONSIDER FULLY ITS SPECTRUM POLICY OBLIGATIONS AS IT IMPLEMENTS THE 1997 APPROPRIATIONS ACT

NextWave notes that, in predetermining a specific spectrum allocation for the express purpose of raising revenues in a short timeframe, Congress has presented the FCC with a difficult task. We urge the Commission to interpret the Omnibus Consolidated Appropriations Act of 1997 ("1997 Appropriations Act")² in a manner consistent with its public interest obligations and

¹ *In the Matter of Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS")*, GN Docket No. 96-228 (rel. Nov. 12, 1996) ("Notice").

² *See Omnibus Consolidated Appropriations Act, 1997*, P.L. 104-208, 110 Stat. 3009 (1996).

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its nearly 70 years of experience with spectrum policy formulation, and not in a manner limited by perceived time constraints.

In particular, NextWave agrees with those commenters who urge the Commission to consider fully its obligations under the 1997 Appropriations Act and the Communications Act.³ Although the Commission might be tempted under duress to take action based on deadlines, the 1997 Act in no way relieves the Commission of its responsibilities under the Communications Act, which specifically requires that “[n]othing . . . in the use of competitive bidding, shall alter spectrum allocation criteria and procedures established by other provisions of this Act,”⁴ including, but not limited to those provisions requiring that the Commission consider the “public convenience, interest, or necessity” when making licensing decisions.

Furthermore, the Communications Act requires that in implementing auctions “the Commission shall include safeguards to protect the public interest in the use of the spectrum. . . .”⁵ Even the 1997 Appropriations Act specifies particular public interest obligations in that the Commission must “seek to promote the most efficient use of the spectrum” and “take into account the needs of public safety radio services.”⁶

NextWave also agrees with those commenters that are concerned that the Commission’s actions in seeking to meet Congressional deadlines not undo existing policies that favor small,

³ See, e.g., Comments of AirTouch Communications, Inc. (“AirTouch”) at 5-6; AT&T Wireless Services Inc. (“AT&T Wireless”) at 3; the Cellular Telecommunications Industry Association (“CTIA”) at 3-4; Lucent Technologies, Inc. (“Lucent”) at 3; and Pocket Communications, Inc. (“Pocket”) at 2.

⁴ See *Communications Act of 1934, as amended* (“Communications Act”), Section 309(j)(6)(A).

⁵ *Communications Act* at Section 309(j)(3). By setting specific revenue targets, it would appear that for this auction Congress has set aside safeguards it adopted in 1993. The FCC “may not base a finding of public interest convenience, and necessity on the expectation of the Federal revenues from the use of a system of competitive bidding. . . .”⁵ *Id.* Section 309(j)(7)(A).

⁶ See 1997 Appropriations Act.

entrepreneurial businesses. In particular, we agree with Pocket Communications that “[i]t is important that the Commission’s policy with respect to the 2.3 GHz band complement, rather than undo the achievements [with regard to opening the wireless personal communications market to new entrants] to date.”⁷

THE PUBLIC INTEREST SHOULD BE THE DETERMINING FACTOR IN LICENSE SIZE AND SERVICE RULES

NextWave agrees with those commenters who suggest that the licenses should be auctioned in the smallest units practicable.⁸ Most commenters support the Commission auctioning this spectrum in units no larger than Major Trading Areas (“MTAs”).⁹ NextWave agrees with this viewpoint. Furthermore, we agree with AT&T Wireless that licensing this spectrum according to moderately sized geographic areas and spectrum blocks “would encourage broad participation by a wide variety of applicants. . . .”,¹⁰ and that “the financial commitment associated with regional licenses or large spectrum blocks would discourage experimentation with new service applications.”¹¹ Furthermore, the Cellular Telecommunications Industry Association

⁷ Comments of Pocket at 1.

⁸ *Id.* at 2. *See also* Bell Atlantic NYNEX Mobile at 2; CTIA at 12; and Omnipoint Corporation at 8.

⁹ *See, e.g.*, Comments of AT&T Wireless at 3, AirTouch at 6, Bell Atlantic NYNEX Mobile, Inc. at 3, CTIA at 12, the Personal Communications Industry Association (“PCIA”) at 16, Pocket at 2-3, PrimeCo Personal Communication, L.P. (“PrimeCo”) at 9; and Sprint Spectrum L.P. d/b/a Sprint PCS and Sprint Corporation (“Sprint”) at 5.

¹⁰ AT&T Wireless at 3.

¹¹ *Id.* at 3-4.

(CTIA) states that the Commission should consider its public interest obligations and auction these licenses in smaller rather than larger units.¹²

NextWave notes that in its auction design, the Commission has the specific obligation of encouraging “economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants. . . .”¹³ The Notice suggests that any anomalies in the licensing structure will be resolved in the aftermarket through the process of disaggregation. However, it seems inappropriate for the Commission to rely on individual licensees selling portions of their accumulated spectrum and on the hope that the largesse of these licensees will lead to “economic opportunity and competition” or avoid “excessive concentration of licenses.”¹⁴

NextWave also agrees with those commenters that suggest that the Commission should limit license size to 10 MHz or smaller units.¹⁵ Since there is no predetermined or obvious use of this band and no equipment for the band as yet widely available, splitting the licenses into small bandwidths serves the Commission’s statutory obligation to encourage “the development and

¹² Comments of CTIA at 14.

¹³ Communications Act, Section 309(j)(3)(B).

¹⁴ *See, e.g.*, Comments of PCIA at 19.

¹⁵ *See* Comments of AirTouch at 9; AT&T Wireless at 2; Bell Communications Research, Inc. (“Bellcore”) at 3; Omnipoint at 7; PCIA at 9; Pocket at 3; PrimeCo at 11; and Sprint at 5.

rapid deployment of new technologies, products, and services for the benefit of the public.”¹⁶ If licenses are made available in smaller bandwidths, then there is ample opportunity for different entities to acquire licenses and develop a variety of new applications.

Moreover, NextWave agrees with those commenters that ask the Commission to auction these licenses as Basic Trading Areas (“BTAs”).¹⁷ MTAs are too large, and would likely lead to significant post-auction disaggregation. While we are well aware of the Commission’s concern that it cannot grant a large number of licenses in a short period of time, NextWave believes that the Commission should not set arbitrary limits, based on perceived administrative difficulties, that would prevent it from offering these licenses in units smaller than MTAs. By determining that it “cannot” auction more than 306 licenses and meet the Congressionally-imposed deadlines,¹⁸ the Commission has precluded auctioning the spectrum in BTAs.¹⁹ NextWave maintains that the success of the C block auction in bringing new players to the PCS marketplace was due, in part, to the division of the C block spectrum into units small enough to encourage participation by small, entrepreneurial businesses. Furthermore, the Commission has learned from its experience in the course of 11 auctions how to hasten the process.²⁰

¹⁶ Communications Act, Section 309(j)(3)(A).

¹⁷ See, e.g., Bell Atlantic NYNEX Mobile at 2; Omnipoint at 8; Pocket at 3; and Telephone & Data Systems, Inc. (“TDS”) at 1-2.

¹⁸ Notice at Para. 13, n. 27.

¹⁹ There are 493 BTAs. Even if the Commission were to auction all 30 MHz as a single license, it could not be auctioned as BTAs because it would not meet the Commission’s arbitrary criteria of limiting this auction to 306 licenses.

²⁰ The Commission has granted its staff considerable discretion in running auctions. Staff has many tools at its disposal to speed up the pace of an auction, all of which, after 11 auctions, have been tested. For example, the Commission can set minimum bids, raise minimum bid increments, require high levels of bidder activity in the earliest rounds, lengthen the bidding day, and require multiple rounds per day early in the auction. NextWave believes that the Commission should consider carefully its tested auction tools before it arbitrarily sets limits on the number of licenses it should auction.

NextWave disagrees with the Commission's proposed approach that it auction the spectrum at 2300 MHz in larger units and then allow the market to provide for efficient assignment of properties. NextWave agrees with CTIA that "it is more efficient to allocate small licenses and build to the need level than it is to require, as a condition of entry, the accumulation of unmanageably large licenses necessitating subsequent disaggregation. A decision that risks "underassigning" spectrum is more readily cured in the marketplace than is the converse."²¹

Furthermore, allowing licensees of large geographic blocks to freely partition and disaggregate spectrum in aftermarkets, combined with exceedingly short timelines for review of license applications, has the potential of undermining the Commission's long-standing spectrum licensing obligations. While NextWave agrees that providing licensees flexibility to partition and disaggregate their spectrum is beneficial, it would appear here that it is being offered in lieu of a more appropriate Commission decision. In essence, if the Commission were to assign single licenses in large geographic blocks, it would be leaving to the licensee certain aspects of the Commission's spectrum policy obligations.

By auctioning spectrum in large blocks, the Commission would once again create an active secondary market in which a single large or several large bidders would benefit from the sale of licenses, rather than the U.S. taxpayer. On the other hand, by auctioning the spectrum in smaller units, the Commission can meet its public interest obligations outlined above and ensure that the full proceeds of the auction be deposited in the U.S. Treasury. To the extent that the Commission believes it is compelled to limit the number of licenses solely to meet statutory

²¹ CTIA comments at 12. For example, recent announcements of A, B and C block PCS roaming agreements prove that there are many ways in which a licensee can aggregate spectrum to a national footprint.

deadlines (which we do not recommend), NextWave urges the Commission to set a reserve price for the licenses, a price below which the FCC would not sell the spectrum rights, thus preserving the revenues from the auction of this public good for the American public.

The Commission might also consider setting a reserve price for the licenses, regardless of the licensing structure it chooses. Congressional mandate requires that these auctions take place quickly, allowing limited time for all but the best-financed to gather resources. The short time frame combined with the financial community's current level of perceived risk in spectrum investments, will all but ensure that none but the largest, and most established companies will be able to participate in this auction. A reserve price will protect the American public's interest in this spectrum resource, and guarantee that revenues from its auction will be deposited in the U.S. Treasury.

THE FCC SHOULD COMPLETE C AND D, E, AND F BLOCK LICENSING PRIOR TO AUCTIONING LICENSES AT 2300 MHZ

One aspect of the legislation that has the potential to affect unfairly pending licensing proceedings is the preferential treatment that Congress has given winning bidders in the 2300 MHz auction. By requiring that the Commission shorten its time frames for placing the licenses on public notice, and requiring that the funds be in the U.S. Treasury by the fiscal year-end, Congress has guaranteed that winning bidders in this auction will be licensed quickly, but will not necessarily receive full scrutiny. While rapid licensing of auctioned spectrum is a laudable goal, one group of licensees should not be given preferential treatment over another. In particular, we agree with Commissioner James H. Quello that "other Commission processes, including licensing

of other wireless services for which auctions have already been concluded, not be impeded or delayed.”²² Furthermore, we agree with those commenters that believe that it is necessary to have completed PCS licensing prior to auctioning 2300 MHz spectrum, so that those participating in that auction are fully informed as to the value of such licenses.²³

IV. CONCLUSION

NextWave recognizes the severe time constraints under which the 1997 Appropriations Act has forced the Commission to act. In meeting the deadlines outlined in the legislation, NextWave urges the Commission to consider fully its long-standing spectrum policy precedents and due process obligations and adopt service and auction rules that will serve the public interest. Furthermore, NextWave believes that by offering licenses in smaller geographic and spectrum units, the Commission will be able to fulfill both its public interest obligations under the Communications Act and its revenue-raising obligations under the 1997 Appropriations Act.

Respectfully Submitted,

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²² See Notice, Separate Statement of Commission James H. Quello. “I refer, specifically, to the licensing of the successful bidders in the “C block” PCS auctions. Moreover, I note that we will soon begin licensure of the D, E, and F Block winners.” *Id.*

²³ See, e.g., CTIA at 15.

CERTIFICATE OF SERVICE

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